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WORK RELATED TO THE CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS AND
OTHER INTERNATIONAL ARRANGEMENTS AND AGREEMENTS: OTHER INTERNATIONAL,
REGIONAL AND BILATERAL ARRANGEMENTS AND AGREEMENTS RELATED TO
TRANSNATIONAL CORPORATIONS

International arrangements and agreements
related to transnational corporations

Report of the Secretary-General

SUMMARY

Recent efforts to establish international standards to govern the international movement of services, in the context of the Uruguay Round of Multilateral Trade Negotiations, have raised numerous conceptual and policy issues. As in other areas, proposals have taken as their starting point the policies and rules developed in the GATT framework concerning international trade in goods. That model appears still to dominate discussions, despite efforts to qualify and adapt it to fit the peculiar characteristics and needs of international transactions in services. International trade in goods is not, however, the only area of the world economy with respect to which a body of legal notions and prescriptions has been constructed over the past half century. Another important area, at least as closely related to trade in services as trade in goods, is that of international direct investment. The present report briefly discusses several concepts, methods and standards which have been developed with respect to international investment and which may be useful for a discussion of possible concepts and standards relating to international trade in services. Reliance has been placed on a number of recent international instruments - proposed, under

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negotiation, or in effect - which have formulated standards concerning investments (or similar operations). Among those instruments, particular importance is attached to the United Nations draft code of conduct on transnational corporations, still being negotiated in the framework of the Commission on Transnational Corporations. Other instruments - in particular bilateral investment protection agreements, treaties of friendship, commerce and navigation (or establishment) and treaties for the avoidance of double taxation - are also discussed.

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
INTRODUCTION	1 - 4	4
I. ENTRY AND ESTABLISHMENT	5 - 18	5
A. Control over entry	5 - 7	5
B. The notion of establishment	8 - 10	6
C. Degrees of economic presence : permanent establishment and commercial presence	11 - 14	7
D. Conclusions	15 - 18	8
II. STANDARDS OF TREATMENT	19 - 46	10
A. Fair and equitable treatment	20 - 24	10
B. National treatment	25 - 30	11
C. Most-favoured-nation treatment	31 - 35	13
D. Exceptions and qualifications	36 - 39	14
E. Conclusions	40 - 46	15
III. ECONOMIC DEVELOPMENT	47 - 66	17
A. Development as a basic principle	47 - 51	17
B. Preferential treatment of developing countries	52 - 54	18
C. Transfer of technology and restrictive practices	55 - 60	19
D. Technical co-operation	61 - 62	20
E. Conclusions	63 - 66	21
SUMMARY AND CONCLUSIONS	67 - 70	22

INTRODUCTION

1. The present report has been prepared in response to the request by the Commission on Transnational Corporations at its fifteenth session for further work on international arrangements and agreements related to transnational corporations other than the draft United Nations code of conduct on transnational corporations. 1/ Previous reports to the Commission on the topic reviewed the main developments regarding the negotiation, adoption, implementation and follow-up of regional, bilateral and multilateral agreements relevant to transnational corporations. The present report to the Commission reviews several methods, notions and standards which have been developed with respect to international investment and which are useful for any discussion in international forums on possible notions and standards of relevance to international trade in services. It summarizes the main findings of a study on the same topic recently completed by the Centre. 2/ The report does not attempt either to review comprehensively the concepts and standards currently being considered with respect to trade in services or to provide solutions to the problems of law and policy that arise in connection with the negotiation, or adoption of any specific international arrangement in that area. Principal reliance is placed on a number of recent international instruments - proposed, under negotiation or in effect - which have formulated standards concerning investment. Among those instruments, particular importance is attached to the code of conduct on transnational corporations. Other instruments - in particular bilateral investment protection agreements, treaties of friendship, commerce and navigation (or establishment) and treaties for the avoidance of double taxation - will also be referred to as necessary.

2. In attempting to secure for services a legal régime equivalent to that largely achieved for commodities under the General Agreement on Tariffs and Trade (GATT), current efforts aimed at the establishment of a framework for trade in services face difficult problems at the conceptual level, reflecting differences in policy and approach. Existing international arrangements dealing with services have functioned, in the main, on an ad hoc industry basis. General concepts and principles applicable to trade in services have not yet evolved, as they have for trade in goods and for foreign direct investment. Current efforts have looked to existing conceptualizations mainly concerning trade in goods in order to draw and adapt notions and principles appropriate for an international framework on trade in services. This has not been done to the same extent with regard to existing notions applicable to investment. Yet, while it is possible and useful to establish similarities and analogies between trade in services and trade in goods, important differences continue to exist between the two. In particular, trade in goods has long been considered, in economic theory as in commercial practice, a substitute for the flow of production factors. Trade in services, on the other hand, often involves such flows, thus resembling in significant ways the processes usually dealt with under the heading of foreign direct investment.

3. Business people, administrators and economists are well aware of the close relationship and degree of overlap between trade in goods, trade in services and investment. None the less, merely invoking the complexities of "real life" does not suffice. Distinctions - however formal and to some extent artificial - serve important functions in practical as well as policy terms. Differences in the

national and international legal regulation of trade in goods and services and investment correspond to perceived substantive differentiations, in terms of needs, effects and desirable outcomes.

4. This report examines first the questions of entry, presence and establishment of foreign-controlled firms in a country. The principal legal standards for the treatment of persons, products and services of foreign origin as well as such notions as exceptions, derogations and safeguards, which define the limits of general standards are examined next. The notion of development, both as a fundamental international aim and in its applied, concrete dimension, is briefly examined. All these concepts are particularly relevant to the ongoing international discussions on services. Other concepts and standards not mentioned here, such as the notion of corporate responsibility in its legal and practical dimensions, are also important. Brief conclusions summarize the findings and place them in a broader context.

I. ENTRY AND ESTABLISHMENT

A. Control over entry

5. The fundamental fact in international economic and political relations and in international law is the existence of national borders. In the absence of special bilateral or multilateral agreements and arrangements, the legal principles applied to nationals of a State may differ from those applied to non-nationals (with the partial exception of matters relating to fundamental human rights). Furthermore, different legal principles may apply to the treatment of non-nationals, foreign products and services and foreign investment at the border of a State before they have entered its territory and to their treatment inside the territory once the border has been crossed.

6. The traditional rule in customary international law, repeated in numerous treaties and other international instruments, has been that a State is fully competent to decide whether it will admit in its territory foreign goods, services and investments and to determine the conditions for such admission. This principle is expressly formulated in an agreed paragraph of the draft United Nations code of conduct on transnational corporations:

50. States have the right to regulate the entry and establishment of transnational corporations including determining the role that such corporations may play in economic and social development and prohibiting or limiting the extent of their presence in specific sectors. 3/

7. Contemporary conventional (treaty-made) international law has introduced a number of qualifications and exceptions to that principle. The General Agreement on Tariffs and Trade (GATT), for instance, provides for most-favoured-nation treatment - that is, non-discrimination as between different foreign States and nationalities, with respect to goods that are at the borders of a member State, before crossing or concerning the crossing of the borders (art. I), and for national treatment once borders have been crossed and goods are in the territory (art. III). 4/

B. The notion of establishment

8. The term "establishment" does not have a single, well-defined meaning in international legal usage. In tax treaties, "permanent establishment" refers to the setting up of a local operation, of a commercial or other character (see below). In the context of treaties of friendship, commerce and navigation (otherwise known as treaties of establishment), the right, or freedom, of establishment usually covers the right of an alien or a foreign-controlled enterprise to enter the territory of the State concerned, to reside there, to set up and manage companies, to pursue the economic and other activities expressly listed in the agreement, and - sometimes subject to qualifications - to acquire, own and use property in that State. While "establishment" is not solely connected with investment, it is particularly associated with it, because entry and residence are necessary conditions for direct investment by individuals or companies, while it is possible to pursue commercial activities and provide services without being present in the country of import (although in many cases some degree of permanent presence is necessary even then). In most instances, those treaties do not provide for free entry of foreign enterprises; instead, they generally allow full effect to national regulations concerning the entry of aliens and foreign-owned companies. Similarly, most bilateral investment promotion and protection agreements do not provide for a right of entry for foreign direct investment. By stipulating that their provisions apply to investments made in accordance with the laws of the host State, they preserve the latter's right to admit or refuse entry to foreign-controlled firms. In such agreements, however, there is a definite, emphasis on encouraging foreign investment, in part by facilitating its entry in the host country.

9. One of the four basic freedoms provided for in the founding treaty of the European Community is that of establishment (arts. 52-58). 5/ Nationals of member States, individuals or companies have the right to move to another member State and to reside permanently and pursue economic activities in its territory. When so doing, they are entitled to national treatment; they operate "under the conditions laid down for its own nationals by the law of the country where such establishment is effected" (art. 52). An important body of secondary community legislation deals with the manner in which the right of establishment can be effectively exercised. Of particular relevance to present concerns is the distinction between "freedom of establishment" and the "free provision of services" in European Community law. Both freedoms are protected; they are covered by different provisions (arts. 52-58 and 59-66) in the same chapter of the treaty. Both freedoms involve the exercise of a non-salaried economic activity. Other provisions of the treaty and of relevant secondary legislation cover salaried persons and persons crossing the borders between member States for purposes other than the exercise of economic activities. The principal element that distinguishes establishment from provision of services in European Community law is the degree of permanence of the presence of the persons concerned in the host country. If there is no such presence (that is, services are provided by telephone, telex or telefax) or the presence in the territory is temporary (i.e., where a lawyer represents a defendant during a trial), the case comes under "provision of services". If the presence in the territory is permanent - that is, long term - then it is a matter of establishment. The evident conceptual and practical difficulties in drawing the line between the two cases are overcome in part by reference to both freedoms in

relevant instruments. The distinction remains, however, an important one in European Community law.

10. Another forum in which significant developments with respect to establishment have recently occurred is that of the Organisation for Economic Co-operation and Development (OECD). Its codes of liberalization of current invisible operations and of capital movements provide for the removal of major obstacles to the movement of capital, current payments and services among developed market economies. ^{6/} In recent years, the member States' commitment to liberalization has become broader and more effective. While the right of establishment was explicitly excluded earlier from the Code of Liberalisation of Capital Movements, a 1984 amendment expanded the definition of inward direct investment so as to cover most facets of establishment. Of particular importance is the provision requiring member States not to maintain policies or practices in regulated sectors which raise special barriers to non-resident investors as compared with residents.

C. Degrees of economic presence: permanent establishment and commercial presence

11. Current negotiations on trade in services have brought into light the importance of a dimension of establishment that has long been obscured by the misleading precision of legal definitions and prescriptions. The presence of a foreign-controlled firm in a host country is a matter of degree. This is true with respect to trade in goods as well as trade in services and investment. Conceptually as well as practically (in the history of the foreign operations of a firm), those economic activities shade into one another. Starting with trade in goods, a firm's presence in a country other than that of its original headquarters and operation may consist of no more than the location of its (imported) products - yet the presence may be sufficient to allow, for example, the protection of its trade marks in the law of the host country. The degree of presence may gradually increase: there may be a local representative; the products may be imported in bulk and be repackaged; there may be a plant for assembly of the products whose components are all imported; some components may be locally manufactured, and so on, moving obviously towards the activity of foreign direct investment - that is to say, full long-term local production by foreign-controlled firms.

12. That a foreign firm's presence can move along a continuum was long recognized in the law of taxation: the concept of "permanent establishment" in bilateral treaties for the avoidance of double taxation (normally understood to include commercial operations) was devised in order to take that fact into account. Those treaties seek to allocate the income derived from various types of activities by foreign firms for purposes of taxation by the States in which they operate. A principal method for effecting such allocation is to distinguish between types of income and to establish several criteria for linking the income with the State which, according to the convention, is competent to tax it. One of the criteria is the degree of presence of the foreign firm in the territory of a State. The notion of permanent establishment has thus been utilized to refer to the type of presence the income derived from which is to be taxed by the host State. Both the United Nations Model Double Taxation Convention Between Developed and Developing Countries, prepared in 1979, and the Model Convention on the Avoidance of Double

Taxation of Income and Capital, prepared by the OECD Fiscal Committee in 1963 and revised in 1977, provide definitions of "permanent establishment" and related terms which are utilized in the great majority of bilateral tax agreements. ^{7/}

13. A related notion, used in double taxation conventions to deal with income derived from non-industrial and non-commercial activities, primarily income from professional services, is that of a "fixed base". The relevant provision of the OECD Model Convention (art. 14) states that "income derived by a resident of a Contracting State in respect of professional services ... shall be taxable only in that State unless he has a fixed base regularly available to him in the Other Contracting State for the purpose of performing his activities". ^{8/} The term "fixed base" is not defined but is understood to refer to some kind of fixed premises (for example, an office) in the State where the services are performed. The provisions of the OECD article 14 were reproduced in article 14 (paras. 1 (a) and 2) of the United Nations Model Double Taxation Convention. It is obvious that in dealing with this notion, tax treaties are concerned with issues very closely related to those under consideration in the Group on Negotiations on Services (GNS) of the Uruguay Round of Multilateral Trade Negotiations.

14. In dealing with trade in services, the notion of commercial presence, or market presence has acquired particular importance. While some services may be provided across national borders with no need within the importing country for the presence of the enterprise providing the services, in many cases a commercial presence of some degree is necessary. An analogy with trade in goods seems then apposite: the services, like goods, are produced abroad and the local presence merely "facilitates" their sale. Whereas, however, in the case of trade in goods, the production of the commodities can be relatively easily distinguished from their commercialization (allowing for some conceptual problems which may involve defining the "local content" of products), in the case of services, production and disposition (sale) are not easily distinguished from one another. It is clear, moreover, that in many cases the presence that is required in the importing country for the effective sale of services involves the flow of production factors (that is, capital, technology, personnel) across borders, and not merely the flow of "products" (i.e., services). The degree of presence in such cases may be not as advanced as that usually found in cases of foreign direct investment for local production, but it is still far greater than in the typical case of export of goods. The concept of commercial, or market, presence is thus still indeterminate, ranging from the kind of presence that may not even involve a permanent establishment in tax treaty terms to types of presence akin to full-blown investment-type establishment.

D. Conclusions

15. In the legal regulation of trade in goods, a clear distinction is made between the treatment of commodities at the border (that is, their entry) and their treatment once they have legally crossed the border. Liberalization with respect to barriers to entry has been the subject of long, not yet fully completed negotiations, starting with the lowering of tariffs and the removal of quantitative restrictions and moving to the elimination of non-tariff barriers. Treatment of lawfully admitted products has long been covered by the national treatment clause

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in GATT. Questions relating to the entry and presence within the importing country of foreign firms providing the products (for example, the exporter) have generally received less attention, being treated as a side issue of the basic trade transaction. Questions regarding the degree of actual presence of the foreign supplier within the importing country (that is, its permanence, independent character etc.) have been dealt with primarily in the context of international tax relations and agreements.

16. In the case of foreign direct investment, the same distinction between entry and treatment after entry obtains, the object of concern being not the product but the foreign-controlled firm. Emphasis has long been placed on treatment after entry - that is, once establishment has been permitted. A clear-cut right of establishment has been asserted (albeit still with some qualifications) primarily in the case of regional economic integration arrangements. Other international agreements - for example, in the context of OECD - have been moving in the same direction. In most instruments, the right of the host State to control entry is explicitly recognized.

17. Current negotiations on trade in services deal by necessity with all of the issues just enumerated: entry and treatment after entry of "products" (that is, services) as well as entry and treatment after entry of the foreign firms providing the services. The latter is primarily a foreign direct investment issue, and therefore a dispute continues on whether or not to deal with it in what are trade negotiations. In the case of many types of services, it is difficult - and sometimes impossible in practical terms - to establish barriers to entry at the border. The issue of treatment of the services at the point of entry has been kept separate from that of their treatment after entry. Moreover, in the absence of tangible products easily distinguishable from their producers, the issue of the entry and after-entry treatment of service-providing firms has also been sometimes dealt with together with the issues noted above. The notion of commercial presence has been used to account for various degrees of permanent activity of a foreign firm within the importing country. Such presence resembles the types of activity associated with the export of goods, yet often may go beyond it, in that a flow of production factors (capital, personnel) may be involved. It thus approaches the type of presence associated with investment - that is to say, "commercial presence" shades into "establishment". The types of questions normally associated with private foreign direct investment then often arise - *viz.*, capital movements, transfer and implantation of technology, employment, nationalization and compensation.

18. These are no mere academic quarrels over terms and concepts. The issues involved essentially concern policy choices and decisions. Analogies and resemblances are mere aids to analysis with a view to clarifying the policy issues at stake. National and international policies underlying the established legal regulation of foreign direct investment are at least equally relevant, with respect to the legal regulation of trade in services under negotiation, as the policies relating to trade in goods. Recent efforts at reaching a wider consensus concerning the former (for example, in the negotiations over the United Nations code of conduct on transnational corporations and in the extensive network of bilateral investment treaties) are then of immediate pertinence with respect to the negotiations on trade in services.

II. STANDARDS OF TREATMENT

19. In order to provide for the treatment to be given to foreign products and foreign-controlled enterprises, international instruments usually have recourse to one of three principal standards: fair and equitable treatment; national treatment; and most-favoured-nation treatment. Other legal standards are also used, although not as frequently as these. Most legal standards are relative (or contingent), in the sense that they do not specify by themselves the rules and principles to be applied but refer instead to an existing body of rules which continues to evolve and change over time. In a limited number of cases, absolute (or non-contingent) standards are used - that is to say, the rules to be applied are set out in more or less detail in the instrument itself. This happens where the relevant rules and principles, whether of national or international law, are not clear or are in dispute or may be affected by subsequent action of the parties. Combinations of contingent and non-contingent standards or of various types of standards are not uncommon.

A. Fair and equitable treatment

20. The standard of fair and equitable treatment, originally used in the Havana Charter of 1948 (art. 11 (2)) 9/ and then taken up in the draft convention on the protection of foreign property, proposed by OECD in 1967, 10/ has found favour in recent years in bilateral agreements on investment promotion and protection. It is referred to in the Lomé-III Convention 11/ and in the Convention establishing the Multilateral Investment Guarantee Agency (MIGA) (art. 12 (d)), 12/ and has also been included in the draft United Nations code of conduct on transnational corporations. 3/ This standard differs from other standards in that it does not refer to an established body of law and does not provide specific, absolute rules to which the host State should conform. It is a general, vague standard, whose principal virtue is the sense of concreteness and specificity suggested by the two adjectives.

21. The manner in which the fair and equitable treatment standard is used - in particular its relationship to other standards and principles - varies considerably among investment agreements. In some instruments, it is the only general standard used, with references to national and most-favoured-nation treatment directed at specific issues. In other instruments, it is used in conjunction with the other two standards. 13/

22. There is, as yet, limited practice and arbitral jurisprudence to assist in any attempt to determine the contents of the standard. One possible approach, originally suggested in the commentary to the 1967 OECD draft convention and supported by some students of recent bilateral investment treaties, 14/ is to see it as covering an array of international legal principles - among them, non-discrimination, the duty of protection of foreign property by the host country and the international minimum standard. This approach may be going too far in its search for specificity. On the other hand, some of these principles have been long debated as to their precise content and status.

23. Another, more likely approach sees the strength and attraction of the fair and equitable treatment standard in its concreteness and its relative lack of abstract legal content. Both of the adjectives used refer not to abstract justice, to legal rules in their clear and rigid form, but to the concrete outcome of the application of legal rules. What appears to be sought is a reference to the prudent and just application of legal rules to particular situations. An invocation of the fair and equitable treatment clause would not necessarily involve a challenge to the abstract legality of the law being applied or to the authority and competence of the organ that has acted; it would only evoke the concrete lack of justice (unfairness) of the outcome. In that sense, it may cover cases of unfair discrimination as well as all other kinds of unfair treatment.

24. Accordingly, the chief usefulness of the reference to this standard in an international instrument would be to provide a relatively easy means for raising questions about the treatment of investors. In its absence, the State concerned would have to resort to allegations about infringements of customary or conventional rules of international law; it would have to state in too clear a fashion something approaching an international claim. Reliance on the obligation to accord fair and equitable treatment would avoid this kind of "overkill", while providing a legitimate, previously agreed upon channel for communication between the States involved and for examination of the specific issue. Thus, even in the absence of effective dispute settlement mechanisms and procedures, the presence of the "fair and equitable treatment" clause would permit the minimum consultations and discussions needed. Where dispute settlement mechanisms and procedures do exist, this clause would give an opportunity to conciliators or arbitrators to resolve problems not solely by reference to strict legal rules but by considering the entire situation at issue.

B. National treatment

25. The notion of national treatment appears in current international law in two discrete - albeit not unrelated - contexts. In international conventional (treaty-made) law, the national treatment standard, established by express provisions, ensures the equality of treatment between aliens and nationals and between the products and services of foreign and indigenous origin. In international customary law, on the other hand, the standard of national treatment (or of equality of treatment) is one of the competing doctrines for the treatment of the person and property of aliens. ^{15/} The two meanings of the term are obviously not unrelated, although the contexts in which they are invoked in doctrine as well as in practice differ in important ways. This section deals with the first meaning of national treatment - that is, with its use in treaty practice concerning trade and investment and in similar contexts. The analysis of the notion of national treatment in that sense has obvious implications for the application of the standard in the second meaning as well.

26. The definitions of "national treatment" found in international instruments and other authoritative texts are by and large similar - indeed, often identical. A typical definition is found in the treaties of friendship, commerce and navigation concluded by several developed countries. ^{16/} Similar but broader in scope is the

definition in the OECD Declaration on International Investment and Multinational Enterprises, of 21 June 1976. ^{17/} A more abstract definition is provided by Endre Ustor, acting as Special Rapporteur of the International Law Commission in his fifth report on the most-favoured-nation clause. ^{18/} In many relevant instruments, no general definition is given; the instrument provides that with respect to a specific matter, aliens or foreign products should be treated in a manner no less favourable than the nationals or products of the State concerned or that the State in question should not discriminate on the ground of nationality or national origin. Article III of GATT, entitled "National treatment on internal taxation and regulation", is a good illustration of this approach. A similarly specific formulation is that of article 2 of the revised Paris Convention on the Protection of Industrial Property (originally concluded in 1883), ^{19/} and, in a related field, more recently, that of article 5 of the World Intellectual Property Organization (WIPO) draft treaty on intellectual property in respect of integrated circuits (May 1989). ^{20/} A broader formulation, in the special context of a regional economic integration agreement, is found in article 7 of the Treaty of Rome of 1957, establishing the European Economic Community. ^{5/}

27. Finally, an object lesson in the qualifications, limitations and exceptions which usually surround general statements of the national treatment standard may be found in the 1983 version of the relevant paragraph (para. 49) of the draft United Nations code of conduct on transnational corporations. ^{21/} The 1988 proposed version of the same standard (para. 52) illustrates a possible approach that enjoys broad support. ^{3/}

28. The national treatment standard usually operates within the territory of the country concerned, not at the borders. That is the case, for instance, in the framework of GATT (as noted above) as well as in that of most bilateral treaties of friendship, commerce and navigation, to the extent that they apply the standard. The principal exception concerns economic integration arrangements, such as the European Community, where a rule of non-discrimination against nationals may apply at the borders as well as in the territory of each country member.

29. The typical formulation of the national treatment standard refers to "like situations", or "like products". The exact meaning of the expression may be difficult to determine in concrete cases: the more a situation or product is perceived as unique or atypical, the more controversy is likely to arise. Determining in a specific case whether a domestic and a foreign-controlled enterprise are "in like situations" involves a judgment of particular situations. In the OECD, some of the specific circumstances to be taken into account are the following: whether the two enterprises are in the same industry; the impact of policy objectives of the host country in particular fields; the motivation behind the measure involved. In a number of recent texts, the word "similar" is favoured (e.g., the Expert Advisers' proposal on the pertinent provision of the United Nations draft on the code of conduct on transnational corporations, which refers to "treatment accorded ... in similar circumstances". ^{22/} It is not quite clear in what exact manner "similar" differs from "like". References to "the same" or "identical" circumstances are rarely, if ever, found in treaty practice (but the term is suggested in one of the proposals on article 49 of the 1983 text of the United Nations draft code). ^{21/} Use of these words would tend to narrow the

meaning of the expression, since there would be far fewer identical situations than similar or like ones.

30. The OECD Committee on International Investment and Multinational Enterprises, in its reviews of the measures of member countries which are related to national treatment, has paid particular attention to six broad categories of measures, on the ground that they are the principal areas where the laws, regulations and practices of member countries sometimes have a discriminatory effect on foreign-controlled enterprises. 23/ The categories in question are clearly not exhaustive and represent a practical rather than a systematic selection of topics for examination. They are: official aids and subsidies of various kinds; tax obligations; governmental procurement; treatment of investments of established foreign-controlled firms; access to local bank credit and the capital market; and problems of corporate nationality. The Committee has established elaborate lists and has considered the motivation of the measures (public order and security, various governmental policies etc.) and their relative importance. Measures falling within expressly allowed exceptions in the relevant formulation (such as those relating to public order and security), while not needing justification by the State concerned, are still to be communicated to the Committee for purposes of transparency.

C. Most-favoured-nation treatment

31. The standard of most-favoured-nation treatment is also a standard of non-discrimination - in its case, between aliens (and foreign-owned enterprises) of goods and services of differing national origins. The definitions in different treaties and other international instruments closely resemble one another. 24/ Provisions prohibiting discrimination between States - members of an international organization or signatories of the same convention - are found in several international instruments.

32. The cumulation of the national and the most-favoured-nation standards is not uncommon in recent treaty practice. The beneficiary State is entitled to both national treatment and treatment better (or different) than national treatment, if the latter is accorded to a third State. If the original agreement between two States provides only for most-favoured-nation treatment and subsequently one of the States grants national treatment (with respect to the same subject-matter) to a third State, the prevailing view (although with some opposition) is that the other State of the initial two is entitled to claim national treatment as well.

33. The role of the non-discrimination standard is similar in the cases of trade and of investment. The standard is particularly relevant with respect to treatment at the borders - that is, concerning the admission of products and investments in a country. Its importance is enhanced by the increasing internationalization of the world economy.

34. In the early decades of its modern application, the most-favourable-nation standard was formulated and applied conditionally - that is to say, the original "other contracting party" became entitled to the treatment granted to third States

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only if it was prepared to offer to the granting State the same concessions that the third States had given. The most-favourable-nation clause was thus applied on the basis of strict and specific reciprocity. More recently, however (since 1860 in Europe and after 1923 in the United States), the unconditional application of the standard has prevailed. The treatment granted to a third State is now automatically extended to the State originally given most-favoured-nation treatment. The most-favourable-nation standard thus becomes a method for extending non-discriminatory treatment on a more or less universal basis, using bilateral or multilateral agreements as a means for establishing uniform standards.

35. This aspect of most-favourable-nation treatment was, until recently, thought to be well established in multilateral agreements concerning trade, especially GATT. As the language of article I of GATT makes clear, the clause in its multilateral application is clearly and necessarily unconditional. 4/ Negotiations over trade in services have brought back the possibility of a requirement of specific reciprocity - that is, of conditional non-discrimination. Only those States that are prepared to accept certain commitments (e.g., concerning national treatment of providers of services) might be entitled to corresponding treatment by other States. The logic of bilateral relations is thus imported into multilateral agreements (from which, it is true, it was never fully absent). Such a reversal in the direction of international economic and legal relationships has obvious costs, even apart from the resulting complications and uncertainties.

D. Exceptions and qualifications

36. The actual substance of the treatment to be accorded to investments in the services or goods sector is also determined by qualifications attached to the provisions on the standards of treatment which may allow States to take, under specified conditions, actions or measures otherwise not in accord with the provisions in question. Such qualifications take the form of exceptions - i.e., situations where the grant of treatment does not apply or applies only in part; derogations - i.e., cases where an appropriate body allows non-application of the standards; and safeguards (once known by the more transparent name of "escape clauses") - i.e., grounds which a country may invoke in order not to carry out its commitments, subject to counter-action by the competent organization or other States.

37. The principal and most widely recognized exception concerns measures based on the protection of national security (or essential security interests) and public order. As in the case of other exceptions, the State involved is the sole judge of the propriety of its action. Other exceptions relate to participation in regional economic integration arrangements, the effect of constitutional structures and basic laws, and the effects of national regulatory action to protect important social interests.

38. Derogations and safeguards resemble exceptions in that they make it possible for a State not to carry out some of its obligations under an agreed instrument. They are more limited in their use and effect, in terms of both the possibilities they are allowed in the related provisions and the control over their use exercised

by competent organs of the international organization involved or by other States affected by the measures in question or otherwise concerned.

39. An issue that comes up frequently in such contexts is "transparency" - i.e., the need for disclosure and clarity in all governmental measures that affect the operation of foreign-controlled firms in a host country. Transparency may involve the elimination of obfuscation and secretiveness, clearly a necessary condition for the normal operation of all enterprises in a country. It may go beyond that, to ensure that all relevant governmental measures are published in timely fashion and made available to all concerned. It may further involve a requirement that States notify other States or a competent international agency of all relevant laws and measures. Here, obvious difficulties become apparent, especially with respect to a multilateral, more or less universal arrangement. Matters are still more difficult, in practical as well as conceptual terms, when the possibility of notice before action is taken is suggested.

E. Conclusions

40. Provisions or standards of treatment in international instruments acknowledge in legal terms that the treatment accorded to foreign products, services and investments is an internationally relevant issue. It is, of course, a fundamental, long-established principle in international law that each State is sovereign within its territory and that its nationals as well as any non-nationals in the territory are subject to its jurisdiction. Recognition of international relevance does not imply any denial or limitation of territorial jurisdiction and sovereignty. It merely expresses, in legal and diplomatic terms, the central fact of present-day international economic relations that the treatment of one country's products, services or investments by another country is not a matter of indifference to the first country. Provision for treatment in accordance with the standards discussed here in international instruments not only recognizes such concern but - perhaps more importantly - also establishes the channels and methods for giving effect to it as well as the limits to be placed upon its exercise.

41. The national and most-favoured-nation standards are essentially non-discrimination standards. The rationale for granting such treatment varies, depending on the industries or sectors and subject-matter involved. The assimilation of aliens and nationals is one of the imperatives of the international protection of human rights as far as basic standards of treatment of persons and property are concerned (i.e., protection against arbitrary governmental action, guarantees of fundamental human rights etc.). This rationale may or may not extend beyond the treatment of the person to touch upon property rights and the rights of legal persons (companies and associations). From another angle, the grant of non-discriminatory treatment to foreign products and to the economic activities of aliens and foreign-owned firms serves to eliminate distortions in trade and competition and thus enhance the effective operation of the world economy. A more modern extension of this last argument points to the ongoing internationalization of investment and production and concludes that non-discrimination, in its various forms, is necessary for the effective functioning of increasingly internationalized enterprises and of an international economy whose principal trait is interdependence.

/...

42. On the other hand, non-discrimination cannot be a global standard, to be applied with no exceptions or qualifications. The basic political, economic and cultural unit in today's world remains the nation-State, which is responsible for national economic growth and welfare. There is no substitute for national action to ensure economic development, full employment, improvement of the quality of life etc. Co-operation among sovereign States does not necessarily depend on the total absence of differentiation between national and non-national activities and actors. Moreover, in a world marked by stark inequalities in economic power, technical capabilities and financial strength, differentiation between nationals and non-nationals may be necessary precisely in order to bring about a degree of operative equality. The strengths and the needs of domestic and foreign firms differ, and differential treatment may be appropriate.

43. In actual practice, with the partial exception of economic integration arrangements, the application of the general non-discrimination standards (both national treatment and most-favoured-nation treatment) is subject to extensive and far-reaching exceptions, derogations and other types of qualifications. The wording of paragraph 49 of the 1983 text of the draft United Nations code of conduct on transnational corporations provides an object illustration of the extent and effect of such qualifications. The discussion earlier in this report provides ample documentation of the point.

44. With respect to trade in services, additional problems arise. Since in many cases services cannot be inspected at the border, the national regulation of services plays a dual role, equivalent to both tariffs and marketing regulation in the case of trade in goods. Non-discrimination standards may, furthermore, not be the most appropriate - that is, the most effective standards with respect to services - since discrimination against foreign providers of services is not the only significant barrier to the increased flow of services across borders. Many service industries are subject to national regulatory régimes (as in the case of banking, the liberal professions, telecommunications, advertising etc.), and the differences in national laws are, even in the absence of discrimination, powerful barriers to international transactions in services. The recent experience of European Community countries is particularly pertinent in this respect. Non-discrimination is usually invoked in order to bring about deregulation.

45. The existence of such problems with the general standards makes "fair and equitable treatment" a broad and usefully flexible standard. It is best understood as providing for the prudent and just application of legal rules to particular situations, and not as implying other standards or international legal principles. In that sense, it does refer by implication to such principles as non-discrimination, but in a concrete manner. It is not discrimination as such that may be said to constitute treatment infringing the fair and equitable standard, but rather undue discrimination, discrimination that in context is inappropriate and "unfair". The standard provides a convenient concept for starting discussions on any case of alleged mistreatment of an investor (or, in the case of trade in services, a provider of services). Yet, while acknowledging the legitimacy of the interest of the State of origin in such matters, it does not require allegations of unlawfulness or treaty violations on the part of the host State.

46. At the same time, as the example of bilateral investment treaties makes clear, the fair and equitable treatment standard may be supplemented by references to other standards or to specific legal prescriptions. In that case, the standard serves as an all-encompassing "umbrella" covering issues and problems that the other, more specific, standards and rules do not cover.

III. ECONOMIC DEVELOPMENT

A. Development as a basic principle

47. The economic and social development of developing countries is recognized today as a fundamental goal of the international legal and economic order. Major recent international framework agreements, especially those dealing with subjects intimately related to the international economy, acknowledge that goal and incorporate it into their statements of purpose.

48. A significant example of such an agreement is the United Nations Convention on the Law of the Sea. The promotion of the development of developing countries is listed among its aims and informs its structure and provisions. Concern for development shapes its approach to most issues. Another pertinent illustration is found in part II of the Punta del Este Ministerial Declaration, on negotiations on trade in services. In listing the aims of the negotiations, the Declaration refers to the expansion of trade in services and to the promotion of the "economic growth of all trading partners and the development of developing countries". 25/ It is significant that development is not listed merely as a factor to be taken into consideration or as a possible ground for exception or special treatment, but constitutes one of the principal aims of the negotiations. The examples can be multiplied. In international negotiations with a view to establishing principles and rules on economic matters, development has been a major consideration. In particular, it has been a central aim of international conventions and other instruments that provide international standards for the conduct of States and other international economic actors - notably, in the United Nations code of conduct on transnational corporations.

49. The fundamental aim of promoting development can be given effect in a number of ways. The most important way is to so structure the substance of the instrument as to address its provisions to the situation of developing countries, and to maximize their contribution to development. This involves the selection of issues on which commitments are to be made, the appropriate formulation of rights and obligations so as to take into consideration the capabilities and needs of developing countries, and the choice of measures and industries to be covered by the eventual instrument.

50. The structure and contents of the United Nations code of conduct on transnational corporations are pervasively informed by the principle of promotion of development. The code establishes standards for the activities of transnational corporations in developed as well as developing countries, and for their treatment by such countries in their role as possible home and host countries. Thus the code, while not dealing solely with the situation of developing countries, shows

special concern for their interests and for conditions in them. It seeks to ensure that not only Governments but transnational corporations as well will work for the promotion of development. Thus, paragraph 10 of the draft United Nations code of conduct on transnational corporations provides that:

Transnational corporations should carry out their activities in conformity with the development policies, objectives and priorities set out by the Governments of the countries in which they operate and work seriously towards making a positive contribution to the achievement of such goals ...
Transnational corporations should co-operate with the Governments of the countries in which they operate with a view to contributing to the development process ... 3/

This paragraph is followed by a number of provisions in which this concern is given effect while dealing with questions of ownership and control; employment conditions and industrial relations; balance of payments; financing; promotion of exports; local content; repatriation of profits and capital; and use of local financial and capital markets.

51. A similar approach implies an effort to adapt the legal relationships in an international instrument to the particular conditions and needs of developing countries. The case of international double-taxation conventions provides a useful illustration of this issue. Such conventions have devised methods for avoiding double taxation by allocating categories of income between the taxpayer's country of residence and the country where the income originated ("country of source"). As the OECD Fiscal Committee has pointed out, "existing treaties between industrialized countries sometimes require the country of residence to give up revenue. Such a pattern may not be equally appropriate in treaties between developing and industrialized countries because income flows are largely from developing to industrialized countries and the revenue sacrifice would be one-sided." 26/ To remedy this kind of imbalance, changes in the contents of model treaties were found to be necessary. Thus, the United Nations Model Double Taxation Convention Between Developed and Developing Countries, 7/ while based on the OECD Model Convention (which is largely applicable to developed countries), 7/ departs from it in specific respects in order to take into account specific conditions and likely flows of income. For example, in the United Nations Convention the definition of "permanent establishment" has been amended to include certain types of operation that would not be considered under the OECD Model. The allocation of taxing jurisdiction for income from shipping is changed to allow developing States additional possibilities for deriving revenues. This example is particularly telling because it relates to a highly technical and even legalistic field.

B. Preferential treatment of developing countries

52. An equally significant manifestation of the promotion of development is the application to developing countries of special rules and principles that assist them in their pursuit of development. Being a developing country may thus be regarded as a broad exception like national security. Developing countries may,

for example, be exempted from some or all of the obligations undertaken in an agreement, may be given longer transitional periods or may be allowed to invoke their status as developing countries or their need to promote their development in order to avoid carrying out particular commitments.

53. In the draft United Nations code of conduct on transnational corporations, paragraph 52 on national treatment includes an exception allowing a developing country additional leeway in its measures and policies towards transnational corporations. 3/ A more far-reaching provision, the archetype of prescriptions on the development needs of developing countries, is found in the framework of GATT, where the principle of preferential treatment for developing countries and of non-reciprocity in concessions was first declared in part IV of the Agreement adopted in 1964 and was later formally adopted and elaborated at the Tokyo Round.

54. A number of international instruments are directed at the promotion of development from such a perspective. An important example in an interregional context, remarkable for its comprehensive character, is the Convention of 1984 between 66 African, Caribbean and Pacific States and the European Community, better known as Lomé-III. In providing for co-operation between the two groups of States, with a view to promoting and expediting their "economic, cultural and social development", 11/ the Convention covers numerous areas, including agriculture, industrial development, mining, transport, trade and culture. Both financial and technical co-operation are used as instruments of the Convention. Arrangements concerning general and particular trade issues are also provided. The entire Convention may thus be understood as giving effect to the principle of promoting development. It covers most established methods to that end, including trading arrangements, technical co-operation, financing and the promotion of investments.

C. Transfer of technology and restrictive practices

55. Technology forms part of most legal and economic definitions of foreign direct investment; it is incorporated in many products covered by trade in goods; it is part of what is being provided as services, and it is used in the provision of services. Technology and its transfer and implantation are thus dealt with in international instruments, both directly and as part of other forms of resource flows. Its overall importance makes it central to the promotion of development.

56. The draft code of conduct on transnational corporations deals rather succinctly with the issue of transfer of technology, partly no doubt because the topic is covered in detail in another major draft instrument which has long been under negotiation, the proposed international code of conduct on transfer of technology, under the auspices of the United Nations Conference on Trade and Development (UNCTAD). In the code on transnational corporations, the paragraph on the topic (para. 38) follows the pattern established with respect to a number of other issues of first requiring transnational corporations to conform to local laws and regulations and then asking them, on the one hand, to avoid practices harmful to the international flow of technology and the technological development efforts of developing countries and, on the other, to contribute through their operations to strengthening the technological capacities of developing countries. The

formulation of the code provision is very general; it may best be seen as a summary outline of a more specialized instrument on the topic.

57. The proposed international code of conduct on transfer of technology is more comprehensive and ambitious, covering in considerable detail most relevant issues. It spells out the policies and measures that States may adopt in establishing regulations for the transfer of technology, lists the restrictive and other practices that should be eliminated or controlled and enumerates the responsibilities and obligations of parties to transactions. It contains a series of provisions on the special treatment of developing countries and concludes with provisions on intergovernmental collaboration and institutional machinery. The persisting disagreements on a number of particular points do not affect the general acceptance of the structure and outline of the code.

58. The UNCTAD draft code thus embodies the two major aspects of international efforts to promote development: it is, in its entirety, an instrument directed at protecting developing countries and assisting them in acquiring technology on appropriate terms and using it to improve their technological capabilities; and it includes provisions on special - that is, favourable - treatment for developing countries, with a view to facilitating their access to technology and to technical assistance.

59. Another major instrument, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, prepared under the auspices of UNCTAD and adopted in 1980 by the General Assembly in resolution 35/63, has a similar general structure. Development, one of its principal objectives, informs in a significant manner all of its provisions, some of which are designed to assist developing countries derive benefits from the instrument.

60. There is a certain overlap between the Set of Mutually Agreed Equitable Principles and Rules and the proposed code of conduct on transfer of technology, which, as noted, includes a chapter on restrictive practices. The overlap serves to underscore for developing countries the importance of the control of restrictive practices at the international level although affected by such practices, many developing countries have not developed adequate national mechanisms to cope with them.

D. Technical co-operation

61. Most international instruments on foreign direct investment do not currently provide for support in terms of technical co-operation. However, as part of the present international policy framework for foreign direct investment, the international community has made provision for technical co-operation, especially through the advisory services provided by the United Nations Centre on Transnational Corporations and the agencies of the World Bank group. Such services are foreseen in the text of the Multilateral Investment Guarantee Agency Convention (art. 23), 22/ as part of its investment promotion efforts aimed at improving investment conditions in support of the Agency's guarantee operations.

62. An equally important precedent in a broader context is the Lomé-III Convention (see para. 54), in which financial and technical assistance is a significant and integral element in the implementation of its objectives. Some of the areas covered by the technical assistance programmes within the framework of Lomé-III are particularly relevant to service industries. They include the structural improvement of the production sectors of the economy; training, applied scientific research and applied technology; technological adaptation or innovation and the transfer of technology; marketing and sales promotion; promotion of small and medium-sized enterprises; support for local and regional development banks and financial institutions; transport and communications; and measures for promoting, in the field of air and sea transport, the movement of goods and persons. Moreover, in an effort to achieve effective technical and financial co-operation among signatory countries, the Lomé-III Convention has set up an ambitious programming process addressing the need for genuine co-ordination of action between donor and recipient countries, on the basis of the latter's choices and development strategies. In addition to increasing the financial package of the European Fund to ECU 7,400 million, a major feature of the financial co-operation scheme is the extension of the range of possible operations beyond the execution of new capital projects to programme-aid operations, including the financing of maintenance. This type of built-in scheme for financial and technical co-operation could considerably strengthen the practical dimensions of any international arrangement on services, thus adding to the immediate advantages of negotiating and concluding such an instrument.

E. Conclusions

63. The goal of promoting the economic development of developing countries finds expression today in most major international framework agreements. It is therefore relevant to all negotiations, including those on services. The goal is given effect in the very structure of international instruments, which are designed to fit the conditions and needs of developing countries and of contributing to development. It is also given effect as the foundation of other arrangements and substantive provisions addressing development objectives, in the sense of ensuring preferential treatment for developing countries, allowing exceptions on the basis of their less developed status etc.

64. In negotiations on services, a problem may arise, in view of the positions taken by some countries, over the possible conditional application of the principle of non-discrimination or a concomitant insistence on specific reciprocity in commitments. Such a development would entail a serious departure from basic GATT principles and would create special difficulties for developing countries. Full and consistent application of the principle of preferential treatment for developing countries would presumably require that those countries be allowed to take advantage of all commitments undertaken by developed countries (e.g., with respect to the grant of access to markets, establishment or national treatment), without being required to make equivalent commitments. It may be possible to avoid the formal application of this principle through the conclusion of separate instruments to which only States willing to commit themselves on such issues would be parties or through other methods, but the substantive infringement of a fundamental principle would not thereby be avoided.

65. On the other hand, technology and its transfer are relevant to these negotiations from two possible perspectives, which are largely mirror images of one another. Technology may itself be part of what is provided as services, or it may be used in the provision of services. In considering existing or possible national and international prescriptions, the issue may be approached first by studying the impact and side-effects on trade in services of national and international measures concerning the transfer of technology. (For example, how does national regulation of technology transfer affect the provision of services? What would be the likely impact of the proposed international code of conduct on transfer of technology on the international trade in services?) The issue may then be considered from the reverse angle: in what ways would actual or proposed measures regulating (or, for that matter, liberalizing) trade in services, at the national and international levels, affect the flow and implantation of technology, particularly to developing countries?

66. In this context, a programme of technical co-operation could be of particular importance not only as far as transfer of technology is concerned but also in relation to broader aspects of strengthening the infrastructure of developing countries in the service sector.

SUMMARY AND CONCLUSIONS

67. This survey of key concepts from international framework agreements concerning foreign direct investment shows that the experience accumulated in such agreements and reflected by those concepts may be of immediate usefulness in other international negotiations. What is involved is something more than the mere availability of a stock of notions, principles and approaches. The negotiation of an instrument may be greatly helped by knowledge of how it compares to other instruments in related or overlapping fields. One of the major such instruments is the draft United Nations code of conduct on transnational corporations. Although it has not yet been formally adopted and some disagreement persists as to some of its provisions, it is remarkable for its structure, the number of its provisions that have found consensus in all groups of countries, its comprehensiveness and its practical concern with concrete problems of operations rather than abstract issues of law.

68. Its approach and its provisions usefully complement any eventual instrument in two major ways. First the code covers most of the significant issues concerning foreign direct investment in services. Its concepts, classifications and the approaches it suggests for resolving problems and conflicts should prove useful to any framework agreement in related areas. Secondly, it deals at length and in detail with a principal actor in the present-day world economy, the transnational corporation whose role in not only foreign direct investment but also the provision of trade in goods and services has been abundantly documented. An international framework agreement on trade in services which limits itself to the intergovernmental level leaves out of consideration a series of important and difficult issues - those concerning the entities that engage in the activities whose legal regulations are the code's principal object. In providing for limits and types of national measures allowed, encouraged or discouraged, such an

instrument indirectly deals with the conduct of enterprises: what they may do, what they may not do, in what ways their actions may be influenced. Yet, the actual conduct of the enterprises is not touched upon in an intergovernmental instrument such as the one being negotiated in the field of trade in services. This limitation may be unavoidable; it is not possible to cover all facets of a set of issues by a single instrument, however comprehensive.

69. The existence, however, of a parallel instrument whose main thrust concerns the activities of transnational corporations provides a useful complement. These corporations are not minor objects in the international economy nor are they weak, impotent observers of the action of States. Their conduct is determined not only by the margin of freedom permitted by governmental measures or by the encouraging or discouraging action of Governments but also by their own structures, policies and approaches. The draft United Nations code of conduct on transnational corporations addresses those issues directly. It provides guidance to enterprises as to appropriate policies and activities; it points to ways in which their beneficial impact on the economy and the development of host countries can be enhanced; it stresses the areas and methods of possible co-operation with Governments; and it indicates ways for avoiding conflict. It acknowledges the central role of transnational corporations in the pursuit of international development and seeks to enhance its positive effects. Provisions on the structure and responsibility of enterprises, such as those summarized above, attempt to cope with major facets of business operations in today's internationalized economy.

70. The code of conduct thus covers a significant area of present-day international economic relations which would otherwise be disregarded. It provides balance to framework agreements moving solely at the level of intergovernmental relations and dealing exclusively with the rights and duties of Governments. A full and effective use of the code presupposes its formal adoption in some manner, so that its provisions are finalized and its exact status clearer. Such action would usefully complement the extensive consensus on the code that already exists.

Notes

1/ See Official Records of the Economic and Social Council, 1989, Supplement No. 10 (E/1989/28/Rev.1), para. 70.

2/ Key Concepts in International Investment Arrangements and Their Relevance to Negotiations on International Transactions in Services. Current Studies, Series A, No. 13 (United Nations publication, Sales No. E.90.II.A.).

3/ See E/1988/39/Add.1.

4/ General Agreement on Tariffs and Trade: Basic Instruments and Related Documents (Geneva, 1955).

5/ See Treaties Establishing the European Communities (Luxembourg, European Communities, 1983). See also United Nations Treaty Series, vol. 298 (1958).

Notes (continued)

6/ See Organisation for Economic Co-operation and Development, Introduction to the OECD Codes of Liberalisation (Paris, 1987), note 18, p. 31.

7/ See United Nations Model Double Taxation Convention Between Developed and Developing Countries (United Nations publication, Sales No.E.80.XVI.3). The text of the OECD Model Convention on the Avoidance of Double Taxation of Income and Capital is reproduced in Draft Double Taxation Convention on Income and Capital: Report of the OECD Fiscal Committee (Paris, Organisation for Economic Co-operation and Development, 1977).

8/ Organisation for Economic Co-operation and Development, Draft Double Taxation Convention on Income and Capital (Paris, 1977).

9/ United Nations Conference on Trade and Development, Final Act and Related Documents (United Nations publication, Sales No. 1948.II.D.4.1). See also International Law Quarterly (summer 1948), pp. 283-345.

10/ Organisation for Economic Co-operation and Development, "Council resolution of 12 October 1967 on the draft convention on the protection of foreign property", International Legal Materials, vol. I (1968), p. 117.

11/ The complete text of the Third Lomé Convention (Lomé-III), signed on 8 December 1984, is reproduced in The Courier: African/Caribbean/Pacific/European Community, No. 89 (January-February 1985).

12/ See International Legal Materials, vol. XXIV (November 1985), p. 1,605.

13/ See, for example, the bilateral investment treaty between Saint Lucia and the Federal Republic of Germany, art. 2; and the United States prototype bilateral investment treaty (1984, revised text), art. II, in Bilateral Investment Treaties (United Nations publication, Sales No. E.88.II.A.1).

14/ See International Legal Materials, vol. XXVII (September 1968).

15/ For a detailed discussion on this issue, see, for example, E/C.10/1985/S/2.

16/ See, for example, Treaty of Friendship, Commerce and Navigation between the United States and Ireland, 21 January 1950, art. XXI (1).

17/ See Organisation for Economic Co-operation and Development, International Investment and Multinational Enterprises: The OECD Guidelines for International Enterprises (Paris, 1986).

18/ International Law Commission Yearbook, vol. II (1) (1974), p. 124.

19/ See Convention for the Protection of Intellectual Property, of March 1983, United Nations Treaty Series, vol. 828 (1972), p. 313.

Notes (continued)

- 20/ See WIPO Copyright Laws and Treaties, No. 6 (June 1989).
- 21/ E/1983/17/Rev.1-E/C.10/1983/S/5/Rev.1, annex II.
- 22/ See The United Nations Code of Conduct on Transnational Corporations. Current Studies, Series A, No. 4 (United Nations publication, Sales No. E.86.II.A.15), annex II, col. 4.
- 23/ See Organisation for Economic Co-operation and Development, National Treatment for Foreign-Controlled Enterprises (Paris, 1985).
- 24/ See Treaty of Friendship, Commerce and Navigation between the United States and Ireland, 21 January 1950, art. XXI; draft articles on the most-favoured-nation-treatment clause, art. 5, International Law Council Report, International Law Council Yearbook, vol. II (z) (1978), 8, p. 21; and General Agreement on Tariffs and Trade, United Nations Treaty Series, vol. 55, art. I, p. 194.
- 25/ See "The Punta del Este Ministerial Declaration, part II: negotiations on trade in services", GATT Focus (8 October 1986).
- 26/ Organisation for Economic Co-operation and Development, Fiscal Incentives for Private Investment in Developing Countries: Report of the OECD Fiscal Committee (Paris, 1965), para. 164.



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Item 5 of the provisional agenda*

INTERNATIONAL STANDARDS OF ACCOUNTING AND REPORTING

Report of the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting on its eighth session

SUMMARY

During its eighth session (13-23 March 1990) the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting fulfilled its primary objective and served as a global forum for the discussion of international accounting and reporting issues. The Group considered current developments in accounting from a global perspective. In particular, it discussed accounting implications arising from the continued instability in financial markets, European economic integration and glasnost. It also took up such technical subjects as accounting by and for joint ventures, accounting for pension commitments, accounting for intangibles and accounting for environmental protection measures. Regarding the latter, the Group observed that the state of the environment was one of the most pressing problems facing mankind. While environmental protection measures are in the first instance the task of the Government, accountants have a modest contribution to make. However, most of the members were of the view that further work was necessary in this area before the Group could arrive at conclusions concerning information disclosure and accounting methods. The Group also examined accounting needs in Africa, on the basis of the report of the Secretary-General and called upon the Commission on Transnational Corporations to request the United Nations Centre on Transnational Corporations to undertake the appropriate follow-up action. Lastly, the Group considered that it was appropriate to re-examine its objectives in the light of the changes in the global economy and requested the Centre to prepare a proposal on this subject.

* E/C.10/1990/1.

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
I. MATTERS CALLING FOR ACTION BY THE COMMISSION ON TRANSNATIONAL CORPORATIONS	1	3
II. PROGRAMME OF WORK OF THE INTERGOVERNMENTAL WORKING GROUP OF EXPERTS ON INTERNATIONAL STANDARDS OF ACCOUNTING AND REPORTING	2 - 40	6
A. Review of important current developments at the global and national levels in the field of accounting and reporting by transnational corporations, on the basis of documentation received by the United Nations Centre on Transnational Corporations from individual member States, intergovernmental organizations and non-governmental organizations	2 - 8	6
B. Discussion of accounting and reporting issues identified during the seventh session	9 - 27	8
C. Identification of accounting and reporting issues for discussion on a priority basis during future sessions .	28 - 29	13
D. Further steps to be taken in relation to the development of the comprehensive information system ...	30	13
E. Accounting and reporting issues arising out of the future code of conduct on transnational corporations ..	31	13
F. Appropriate measures to give effect to the work of the Group	32 - 34	14
G. Ways and means of improving education, research and practical training in the field of accounting and reporting in member States	35 - 40	15
III. ADOPTION OF THE REPORT OF THE GROUP ON ITS EIGHTH SESSION .	41	16
IV. ORGANIZATION OF THE SESSION	42 - 57	16

Annexes

I. ISSUES FOR CONSIDERATION: EXTRACT FROM THE REPORT OF THE SECRETARY-GENERAL ON INFORMATION DISCLOSURE RELATING TO ENVIRONMENTAL MEASURES	19
II. DOCUMENTS BEFORE THE GROUP AT ITS EIGHTH SESSION	21

I. MATTERS CALLING FOR ACTION BY THE COMMISSION ON
TRANSNATIONAL CORPORATIONS

1. The Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting recommends to the Commission on Transnational Corporations the adoption of the following draft decisions:

DRAFT DECISION I

Report of the Intergovernmental Working Group of Experts on
International Standards of Accounting and Reporting on its
eighth session and provisional agenda and documentation for
the ninth session of the Group

The Commission on Transnational Corporations decides:

(a) To approve the report of the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting on its eighth session and to commend the Group for its work;

(b) To approve the provisional agenda and documentation for the ninth session of the Group, as set out below.

PROVISIONAL AGENDA AND DOCUMENTATION FOR THE NINTH SESSION OF THE
INTERGOVERNMENTAL WORKING GROUP OF EXPERTS ON INTERNATIONAL
STANDARDS OF ACCOUNTING AND REPORTING

1. Election of officers.
2. Adoption of the agenda and other organizational matters.
3. Programme of work of the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting:
 - (a) Review of important current developments at the global and national levels in the field of accounting and reporting by transnational corporations, on the basis of documentation received by the United Nations Centre on Transnational Corporations from:
 - (i) Individual member States;
 - (ii) Intergovernmental organizations;
 - (iii) Non-governmental organizations;

Documentation

Reports of the Secretary-General, including two separate reviews of important current developments in the field of accounting and reporting by transnational corporations, one at the global level and the second at the national level

- (b) Discussion of issues of accounting and reporting identified during the eighth session, namely:
 - (i) Accounting for and by joint ventures;
 - (ii) Accounting for environmental protection measures;
 - (iii) Accounting and reporting during and after the transition from State to private enterprises;
 - (iv) The organization of the accounting profession and the role and qualifications of auditors.

Documentation

Reports of the Secretary-General and relevant reports of international organizations

- (c) Identification of issues of accounting and reporting for discussion on a priority basis during future sessions;
- (d) Further steps to be taken in relation to the development of the comprehensive information system;

Documentation

Report of the Secretary-General

- (e) Accounting and reporting issues arising out of the future code of conduct on transnational corporations;
- (f) Appropriate measures to give effect to the work of the Group;

Documentation

Reports of the Secretary-General

- (g) Renewal of the mandate and review of the objectives;

Documentation

Report of the Secretary-General

- (h) Ways and means of improving education, research and practical training in the field of accounting and reporting in member States.

Documentation

Report of the Secretary-General containing the results of follow-up actions after the survey relating to Africa

4. Provisional agenda for the tenth session of the Group.

Documentation

Draft provisional agenda for the tenth session of the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting: note by the Secretary-General

5. Adoption of the report of the Group on its ninth session.

DRAFT DECISION II

Survey of accounting needs in Africa

The Commission on Transnational Corporations decides that the following measures should be undertaken by the United Nations Centre on Transnational Corporations:

Whereas, the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting requested the Centre on Transnational Corporations to undertake a survey of accounting needs in Africa;

Whereas, the Centre, together with the World Bank and the International Labour Organisation, has complied with this request and has identified accounting needs in Africa;

Whereas, the Group has reviewed this survey and its findings during its eighth session and found the report to be the essential step towards identifying the various aspects of technical assistance in accounting education, training and research;

Therefore, the Commission on Transnational Corporations invites the United Nations Centre on Transnational Corporations to take the necessary follow-up action, including:

- (a) Holding regional meetings in Africa with the specific purpose of discussing the findings of the survey and identifying with the representatives of Governments, academia and the accounting profession, long-term and comprehensive strategies to strengthen accounting development;

(b) Organizing these meetings with the international aid community, including the World Bank, the International Labour Organisation and the United Nations Development Programme, as well as regional and bilateral agencies and professional organizations;

(c) Formulating, based on these strategies, pilot projects for meeting accounting needs in Africa.

II. PROGRAMME OF WORK OF THE INTERGOVERNMENTAL WORKING GROUP OF EXPERTS ON INTERNATIONAL STANDARDS OF ACCOUNTING AND REPORTING

A. Review of important current developments at the global and national levels in the field of accounting and reporting by transnational corporations, on the basis of documentation received by the United Nations Centre on Transnational Corporations from individual member States, intergovernmental organizations and non-governmental organizations

2. At its 1st and 2nd meetings, on 13 March 1990, the Group reviewed important current developments in the field of accounting and reporting by transnational corporations on the basis of two reports of the Secretary-General (E/C.10/AC.3/1990/2 and E/C.10/AC.3/1990/3). The first report (E/C.10/AC.3/1990/2) presented current developments from a global perspective. Four main developments were singled out: the continued instability in financial markets, European economic integration, glasnost and accounting for environmental protection measures.

3. The observer for the Commission of the European Communities reported on the outcome of a recent conference on the future of harmonization of accounting standards. It was decided that it would be premature to reduce the options contained in the Fourth and Seventh Directives of the Council of Ministers of the European Communities. A special advisory board, which would function parallel to the contact committee, would be set up and would consider accounting issues related to Council directives. In response to a question on the future of standard-setting activity in Europe, he said that Europe, as a major exporter and importer, remained interested in international harmonization. However, he reminded the Group that the experiences in harmonizing accounting standards within the Community could be useful for international harmonization because the Community was composed of member States that had radically different approaches to accounting.

4. It was noted in the report of the Secretary-General (E/C.10/AC.3/1990/2) that there had been a shift from individual investors to institutional investors in some financial markets. However, a number of experts said that that trend was not evident in the European financial markets. One speaker reminded the Group that there must be protection of the "common" investors and that their interests must be taken into account so that they received enough information to be able to make informed investment decisions. One expert said that currently in his country such investors could opt to receive summary financial statements instead of full

financial statements, and it was thought that the summary statements would better meet their needs.

5. Regarding glasnost, the expert from the Union of Soviet Socialist Republics informed the Group that the Supreme Soviet was discussing economic restructuring and that the new tax legislation under consideration would resolve many problems of joint ventures. The Methodological Council (an independent body) was also working on accounting problems arising in joint ventures and knew how to resolve them, but the process would take time. He said that the USSR had a well-developed body of accounting standards which covered all sectors of the economy and that these would be adapted in line with international standards. The expert from China stated that the accounting legislation pertaining to joint ventures had taken into account Western accounting systems. The most pressing problem at present for the joint ventures was which foreign exchange rate to apply to foreign investments.

6. A number of suggestions were made to improve the structure of the report. For example, besides reviewing economic developments that had accounting implications, which was an innovation appreciated by the Group, it would be desirable to add a section identifying accounting trends so that the Group could get a better sense of global developments.

7. At its 2nd meeting, the Group began its consideration of the report of the Secretary-General on current developments at the national level (E/C.10/AC.3/1990/3). Experts from India, Japan and Norway provided new information; other experts corrected the information on their countries contained in the report. To improve the response rate, it was recommended that the note verbale continue to be sent out through formal government channels and through informal channels as well and that experts in the various regions take responsibility for ensuring that the replies were sent to the Centre on time. It was also suggested that countries submit their replies in an official language and, if possible, in English also.

8. The Group reviewed the results of the international survey of financial statements published by 194 transnational corporations and other enterprises contained in the report of the Secretary-General (E/C.10/AC.3/1990/4). Many experts in the Group were highly critical of the methodology which called for the answer "yes" or "no" and did not provide for situations where the accounting item was not applicable. They felt that that weakness introduced a downward bias in some scores and thus invalidated the percentage scores obtained. It might have been better if the analysis had focused on why certain disclosures were omitted. For example, an important factor influencing the scores might be the still existing deviations between international and national standards. Some experts said that the survey was not based on a statistically significant sample. Therefore, the findings, especially on a country-by-country basis, should not appear as percentage scores. If the Group should decide to undertake a new survey in the future, the methodology would have to be improved. A number of experts noted that, given the subjectivity in judging disclosure on a particular accounting item, such judgement was better made by a panel of experts. Other members of the Group considered that, while there might be a bias in the percentages, the trends were clear in that enterprises were not providing all the information called for by the Conclusions on

Accounting and Reporting by Transnational Corporations. 1/ Experts from developing countries said that such monitoring exercises were particularly valuable for them because so little information was available on the subject of compliance. Some members discussed the pros and cons of achieving better compliance through an international convention but came to no agreement.

B. Discussion of accounting and reporting issues identified during the seventh session

1. Accounting for and by joint ventures

9. At its 3rd meeting, on 14 March 1990, the Group took up the question of accounting for and by joint ventures, as contained in the report of the Secretary-General (E/C.10/AC.3/1990/8). The Group first considered accounting by joint ventures. The Group discussed at length whether, in the case of international joint ventures, it was necessary to follow internationally acceptable accounting principles. Many members of the Group were of the view that the first objective was to provide usable information to the venturers and the host Government, in which case, joint ventures would have to conform to the accounting standards of the host country. Others were of the opinion that, while it was necessary to comply with the accounting standards of the host country, it was also highly desirable to comply with international standards. It was pointed out that, unless a benchmark system were used, it would be difficult to come up with a common set of financial statements useful to all venturers. That was particularly true where the venturers came from countries with very different economic and accounting systems.

10. On that point, the expert from the USSR stated that, if international co-operation were desired, then a common language must be spoken. Therefore, one should be guided by international standards. Joint ventures had raised many questions in the USSR because of the conceptual differences between the venturers, but they were being worked out. The expert from China said that, as a basic principle, joint ventures had to follow national laws but that the Chinese authorities had also taken into consideration international standards in order to ease the way for foreign investment. In his country, a special set of regulations, which were not applicable to domestic enterprises, had been devised for joint ventures.

11. The Group then turned its attention to accounting for joint ventures. The observer from the Commission of the European Communities noted that the Seventh Directive of the Council of Ministers of the European Communities allowed for either proportionate consolidation or the equity method in consolidated accounts. He added that proportionate consolidation was sometimes preferred on the basis of "control" but that control was difficult to define. Consequently, the Seventh Directive used other terminology - "joint management" - as a way of overcoming the problem. Others agreed that a choice should be allowed between the two methods, depending on the circumstances. Some experts pointed out that a third method might be the expanded equity method.

12. One expert objected strongly to the definition of a joint venture, as set out in the report: "A joint venture implies that control is shared, with no one of the venturers in a position to exercise unilateral control of the venture". He observed that in joint ventures in developing countries, it was often the case that one party had effective management control. Others considered that, given the tightness of the present definition, the report pertained to a limited number of joint ventures. Another expert expressed the view that the definition was too theoretical and that a more practical one was needed. A number of experts noted that the report should be expanded to discuss, more specifically, the problems of joint ventures in developing countries and centrally planned economies. The Group decided to form a small working party which would consider the definition and the possible conclusions that could be drawn up regarding information disclosure and accounting methods and would report back to the Group later during the session.

13. After reviewing the report of the working party, the Group recommended that the Centre:

(a) Elaborate the definition section in such a way that joint ventures managed exclusively or predominantly by one venturer are fully covered;

(b) Provide a section on accounting methods for joint ventures, including the impact of management contracts, franchising agreements and licensing arrangements;

(c) Expand the section of the report dealing with joint ventures in Eastern Europe and centrally planned economies in such a way that the particular conditions under which joint ventures operate there are adequately dealt with.

14. Therefore, the Group recommended that the report be submitted to it at its ninth session, taking into consideration the recommendations made above, as well as the observations and remarks made by the experts and observers at the eighth session.

2. Accounting for pension commitments

15. During its 4th meeting, on 14 March 1990, the Group took up the question of accounting for pension commitments in the financial statements of employers as contained in the report of the Secretary-General (E/C.10/AC.3/1990/7). The Group agreed that the report gave a clear exposition of the issues at stake, as well as of the terms and concepts used in pension accounting. The Group discussed the difficulty a transnational corporation would have in disclosing pension data since it was likely to have a different plan in every country in which it operated. The Group agreed that it should be possible to disclose useful information on the enterprise as a whole but that the information would be more restricted in consolidated financial statements than in individual financial statements.

16. One expert noted that the real need for information disclosure was in the case of internally funded pension plans. Therefore, a distinction should be made between the information required in the case of internal funding and that required in the case of external funding. Another expert commented that the information

needs of employees could be better served on a national basis. Others noted that the information needed by employees might be given in a special-purpose report.

17. So far as accounting methods were concerned, some experts expressed the view that pension costs should be treated as a single item in the income statement. It would not be appropriate to seek to require treatment of any interest component of pension costs as a financial cost in an income statement. Also, some experts considered that it would be inappropriate to recognize actuarial gains and losses and experience adjustments as extraordinary results in the years in which they occurred. Instead, it would be appropriate to amortize the amounts over the average remaining periods of service of the employees.

18. At the end of the discussion, the Group arrived at the following conclusions regarding information disclosure and accounting methods for pension commitments:

(a) The disclosure of pension data by transnational corporations will, by nature, have to be limited since transnational corporations must deal with various national regulations and different company plans. For the purpose of external users such as employees, the local financial statements or special purpose reports may be a more appropriate means of disclosure;

(b) The following elements should be disclosed:

- (i) Type of major pension plans, namely, defined contribution plan or defined benefit plan (career average, final pay or flat benefit type);
- (ii) Organizational structure of the major pension plans: an internal pension fund, an external pension fund or an insurance company;
- (iii) Type of commitment an enterprise undertakes if these commitments are not unconditional;

(c) Consideration should be given to the disclosure of the following information, in so far as applicable:

- (i) Aggregate pension cost per period;
- (ii) For internal pension funds: the actuarial cost methods that are used for accounting and financing purposes and information on the review of the underlying assumptions by external experts;
- (iii) For external pension funds: investments (type, e.g., shares, loans) made by the pension funds in the enterprise and amounts advanced (type, e.g., loan amounts) by the enterprise to the pension plans.

3. Accounting for intangible assets

19. During its 5th meeting, on 15 March 1990, the Group considered the question of accounting for intangible assets. It had before it a report of the

Secretary-General on the subject (E/C.10/AC.3/1990/9). The Group found the report well prepared in that it brought together in an analytically useful way much relevant information. One observer noted that the item-by-item approach was particularly helpful and might be recommended to others studying the issue. Many members of the Group were appreciative of the fact that the report reviewed issues and practices and did not attempt to arrive at conclusions, which would be premature, given ongoing developments. However, others were of the opinion that the Group could arrive at some conclusions. One expert commented that, in his country, the debate over a recent exposure draft on intangible assets was quite controversial and had raised fundamental questions about financial statements. Another expert stated that the Group should not try to dictate precise accounting methods at that time. The important thing was that whatever method was applied should be disclosed.

20. The Group recognized that the issue was a dynamic one because of the growth of the service sector and that the amounts shown for intangible assets were increasing in significance. Some experts stated that under the prudence principle, self-created intangibles should not be capitalized as assets. It was pointed out that some jurisdictions required the constitution of an undistributable reserve in the case of capitalization of certain self-generated intangibles. Many experts observed that revaluation of intangible assets was a matter of the accounting convention in use and was, therefore, not related solely to intangibles.

21. The Group agreed to return to the issue when developments warranted its reconsideration.

4. Information disclosure relating to environmental measures

22. At its 8th and 10th meetings, on 19 and 20 March 1990, the Group took up the question of information disclosure relating to environmental measures, as contained in the report of the Secretary-General (E/C.10/AC.3/1990/5). The members of the Group found the report excellent and a good basis for discussion. The state of the environment is one of the most pressing problems facing mankind. In the opinion of many members, environmental protection is, in the first place, the specific task of the Government and initiatives must be taken at that level. Nevertheless, accountants have a modest contribution to make and they should make it. However, the issue was relevant not just for transnational corporations but for all types of enterprises, including public utilities. Some members suggested giving the report wide circulation among interested parties in Government, enterprises and national and international accounting bodies. Given the fact that some of the information recommended for disclosure in the report might be difficult to provide, those entities might have suggestions on the practicality of presentation. In addition, since developments are under way in the environment field, the Group should have more time to study the question of disclosure.

23. Many experts considered that there were limits to disclosure in general purpose reports. They wondered if some of the information suggested in paragraph 112 of the report of the Secretary-General (E/C.10/AC.3/1990/5) would be

helpful to all users. There was general concern about the type of information that could be given. Some experts said that segmentation of expenses and capital expenditures in the financial statements would be feasible. Other experts expressed their concern about disclosure requirements in the financial statements (see E/C.10/AC.3/1990/5, paras. 112-115). Part of those disclosures would be automatically included in the notes to financial statements that complied with accounting standards generally accepted in many countries. Other disclosures required in paragraphs 112 to 115 of the report were an extension of existing practice. The report did not make a clear distinction between the two.

24. During the review of enterprises, it was found that some were providing information that allowed users to segment environmental costs, while others said it was difficult for them to estimate what part of their investments benefited the environment. One member expressed concern about the need for improvement in the recognition of and provision for liabilities, and contingent liabilities, which were particularly difficult in that area.

25. While some experts were of the opinion that it was premature to call for specific disclosures, others expressed the desire to arrive at some recommendations for information disclosure, however modest. Since their countries faced grave environmental problems, their Governments would be interested in the Group's guidance in accounting and reporting. It was also suggested that the Group commend enterprises that did provide useful disclosures. Furthermore, the Group should request other bodies to look into that matter to see how standards could be formulated and specify which items they should consider. Another expert said that it would be difficult for all members to agree on all items recommended for disclosure in paragraphs 111 to 115 of the report. One member of the Group observed that, regarding subparagraph 111 (e), in many countries enterprises already had to report to the Government on compliance with environmental laws so that the item would merely make the information available to all users. He added that subparagraph 111 (f) was consistent with the general accounting requirement that when a result from an event was material, it must be disclosed.

26. The Group agreed that environmental protection measures are an important matter and that enterprises should at least include a description of their environmental policy, programmes and achievements in the report of the board of directors. Concerning the question about information that might be given in the financial statements, the Group would return to the issue at its ninth session. In the mean time, the Group recommended that Governments and other standard-setting bodies, industry organizations and other interested groups give consideration to the desirability and practicality of providing the type of information set out in section VII of the report of the Secretary-General (E/C.10/AC.3/1990/5), which is contained in annex I of the present report.

27. The Group requested the Centre to prepare a report for the ninth session which would discuss, inter alia: (a) new developments, particularly the work of other organizations; (b) comments received from interested parties on section VII of the report; (c) positive incentives for environmental protection; (d) the type of information enterprises were already providing to government authorities; (e) differences in practices among enterprises, including treatment of expenses and

liabilities in the financial statements arising from environmental protection measures; (f) recommendations for disclosure in financial statements.

C. Identification of accounting and reporting issues for discussion on a priority basis during future sessions

28. At its 10th meeting, on 20 March 1990, the Group identified the following issues for discussion during the ninth session:

- (a) Accounting for and by joint ventures (see paras. 13 and 14 above);
- (b) Accounting for environmental protection measures (see para. 27 for aspects to be included);
- (c) Accounting and reporting during and after the transition from state to private enterprises;
- (d) Organization of the accounting profession and the role and qualifications of auditors.

29. The Group agreed that any further work on the question of intangibles, particularly the monitoring of new developments, should be included in the report on global development.

D. Further steps to be taken in relation to the development of the comprehensive information system

30. At its 9th meeting, on 20 March 1990, the Group considered further steps to be taken in relation to the development of the comprehensive information system, on the basis of the report of the Secretary-General (E/C.10/AC.3/1990/10). One expert commented that the report concentrated on foreign direct investment statistics and wanted to know what improvements were being made in the corporate data and legal information systems. While many of the experts appreciated the difficulty in finding a suitable unit of account to aggregate foreign direct investment data, they observed that, since they were not experts in that field, it would be inappropriate for them to recommend to the Commission on Transnational Corporations that an expert group be formed to address that problem.

E. Accounting and reporting issues arising out of the future code of conduct on transnational corporations

31. The Group decided to defer consideration of accounting and reporting issues arising out of the future code of conduct on transnational corporations, pending the outcome of negotiations on the draft code.

F. Appropriate measures to give effect to the work of the Group

32. At its 7th and 9th meetings, on 16 and 20 March 1990, the Group discussed appropriate measures to give effect to its work. The Group had before it a proposal to create a sub-committee whose task would be to redefine the objectives of the Group. While all members favoured such a redefinition, they preferred that it be done by the Centre rather than by a sub-committee. The Group suggested that the Centre take into consideration the following aspects when preparing its proposal:

(a) That the objectives of the Group should be stated in positive terms in relation to the global economy of today;

(b) That the Group should make a positive contribution to national, regional and international standard-setting;

(c) That it should continue to take into account the interests of all countries, including developing countries and countries from Eastern Europe and centrally planned economies and to assist them in the adoption and implementation of internationally recognized standards through (i) education; (ii) programmes for professional qualifications of accountants; (iii) organization of the accounting profession; (iv) development of standard-setting mechanisms; (v) development of appropriate enabling legislation;

(d) That it should continue to provide a forum for a review of standards from a global perspective.

33. The Group discussed several of its objectives, such as the review of international standards. Many members noted that this function was entirely appropriate because of the intergovernmental and global nature of the Group. They wondered if any endorsement should be given to the standards it reviewed. It was noted that endorsement by the Group would not make those standards binding but would merely signify its approval.

34. It was stated that the continuation of the Group depended not only on the redefinition of its objectives but also on stronger participation from developing countries. There were still a number of vacancies among developing countries that should be filled. Also, attendance of the existing members needed to be improved. While all agreed that financial constraints affected the ability of the experts to participate, there were also problems of co-ordination. The expert from Nigeria, on behalf of the States Members of the United Nations that are members of the Group of 77, called the attention of the Group to the report of the Secretary-General entitled "Ways and means of improving education, research and practical training in the field of accounting and reporting in Member States: results of the survey on Africa" (E/C.10/AC.3/1990/11). The report demonstrated that there was no lack of interest in accounting development in that region but that the collapse of the economies of the region had made it financially impossible to train accountants and to participate in international accounting meetings. The expert was confident that the planned regional meeting in Kenya would solve co-ordination and communication problems. Another expert suggested that the Centre consider the feasibility of

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asking one developed country to sponsor one expert from a developing country on a continuous basis. Experts from developing countries, Eastern Europe and centrally planned economies spoke of the usefulness of the Group. It was the only forum where they could keep in touch with developments and learn from the experience of others. The gathering of experts from different countries with different backgrounds provided for a most useful exchange. In some cases, those experts were able to immediately make use of the Group's conclusions in their home countries. It was suggested that the Centre prepare a report on the reasons for poor participation in the past and the prospects for the ninth session. The report should be sent to Governments and experts by mid-November.

G. Ways and means of improving education, research and practical training in the field of accounting and reporting in member States

35. The Group took up this item at its 6th meeting, on 15 March 1990. It had before it the report of the Secretary-General entitled "Ways and means of improving education, research and practical training in the field of accounting and reporting in Member States: results of the survey on Africa" (E/C.10/AC.3/1990/11). A representative of the Centre explained that the survey of 41 countries in Africa could not have been undertaken without the assistance of the World Bank and the International Labour Organisation. The survey had proved to be an expensive and time-intensive activity for the organizations involved. Consequently, she expressed the hope that since the first step had been completed and the needs had been clearly identified, the Group would be in a position to discuss how those needs could best be met. The representatives of the World Bank and the International Labour Organisation mentioned that, although there were a number of multilateral and bilateral programmes for accounting development in Africa, many had failed because they were short-term and because the beneficiaries did not necessarily remain in their countries or posts owing to better opportunities elsewhere. Also, many countries were too small to consider a national approach to improving accountancy, and a regional approach might be more effective.

36. Experts from the region found the report and its findings accurate. They also spoke of their experiences with aid projects that had accounting components. In their opinion, they did not have any multiplier effect and therefore did not contribute to the accounting infrastructure of the country. One expert recommended that accounting training be standardized and co-ordinated on a regional basis.

37. It was noted with regret that so few experts from Africa were present for the discussion. The representative of the Centre explained that, while funding was available to defray travel costs, it had arrived too late for some experts to make arrangements. An expert from Africa confirmed that the absences were due not to any lack of interest but to lack of resources.

38. One expert stated that any technical assistance should incorporate several features, namely, it should be long-term, it should include apprenticeship training for accounting technicians, and efforts should be concentrated.

39. The expert from the USSR commented that, while approximately 200,000 higher-level and middle-level accountants graduate each year, their status and training need to be improved. In particular, it was necessary to integrate them better into the management team at the enterprise level.

40. After consultation with the Centre, the World Bank and the International Labour Organisation, the Group called upon the Commission on Transnational Corporations to request the Centre to undertake appropriate follow-up action (see chap. I, draft decision II).

III. ADOPTION OF THE REPORT OF THE GROUP ON ITS EIGHTH SESSION

41. At its 11th and 12th meetings, on 22 and 23 March 1990, the Group adopted the draft report on its eighth session (E/C.10/AC.3/1990/L.2 and Add.1-4), as orally revised and amended during the discussion.

IV. ORGANIZATION OF THE SESSION

A. Opening and duration of the session

42. The Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting held its eighth session at United Nations Headquarters from 13 to 23 March 1990, during which it held 12 meetings (1st to 12th meetings), and a number of informal meetings, as well as a round table with the New York Office of Business Development.

43. The session was opened by the Vice-Chairman of the seventh session, Mr. John H. N. Kosieyo (Kenya).

44. At the 1st meeting, on 13 March, the Executive Director of the United Nations Centre on Transnational Corporations spoke about the challenges of the 1990s and the ways in which the Group could meet them under its existing mandate. He said it was necessary for international bodies to re-examine their roles, in the light of new challenges, if they were to continue to render a useful service. The Economic and Social Council had intended that the Group serve as an international body for the consideration of accounting and reporting issues.

45. To fulfil that goal, a number of specific tasks were in order. They included: (a) a periodic assessment of the needs of all users; (b) a continuous review of international standards to ensure that users' needs were met; where gaps were found, the Group should formulate recommendations; (c) monitoring of information disclosure by transnational corporations and other enterprises in order to evaluate the extent to which international standards were being applied and the information needs of users met.

46. The Group's second objective was to make a positive contribution to national and regional accounting developments. This could be done through information, research, training and education. The United Nations was ideally suited to provide

technical assistance through its United Nations Development Programme network and other facilities. In connection with its third objective, the Group had a special obligation to ensure that the needs of developing countries were met by facilitating technical assistance, training and education. The Group should make sure that it recommended a balanced technical assistance programme so that the needs of developing countries were not neglected relative to the needs of other countries. In this regard, he thanked the Government of Switzerland for its generous donation which had made possible the participation of developing countries in the eighth session.

47. Lastly, the Group must re-examine its relationship with the Commission on Transnational Corporations and prepare a report that described the substance of its activities and recommendations in such a way that it could be understood by the non-accountants attending the Commission's session.

48. In response to the Executive Director's statement, some members of the Group observed that it would be worth while to re-examine and rearticulate the Group's objectives under its existing mandate since the world had changed and needs had changed also. Others were of the view that the Group's mandate was complete but that it could be recast in a more positive way.

B. Membership and attendance 2/

49. In accordance with Economic and Social Council resolution 1982/67, the Group is composed of 34 members, elected on the principle of equitable geographical distribution. Three members from African States, two members from Asian States and two members from Latin American and Caribbean States remain to be elected.

50. The following States members of the Group were represented at the eighth session: Brazil, Canada, China, Cyprus, Czechoslovakia, France, Germany, Federal Republic of, Hungary, India, Italy, Japan, Jordan, Kenya, Netherlands, Nigeria, Norway, Peru, Spain, Swaziland, Switzerland, Union of Soviet Socialist Republics and United Kingdom of Great Britain and Northern Ireland.

51. The following States Members of the United Nations were represented by observers: German Democratic Republic, Mexico, Morocco and Turkey.

52. Representatives of the International Labour Organisation and the World Bank attended the session.

53. The Commission of the European Communities and the Organisation for Economic Co-operation and Development were represented by observers.

54. The following non-governmental organizations in consultative status with the Economic and Social Council, category I, were represented by observers: International Chamber of Commerce and International Confederation of Free Trade Unions.

C. Election of officers

55. At its 1st meeting, on 13 March, the Group elected by acclamation the following officers:

Chairman: Asta Tjölse (Norway)

Vice-Chairmen: Talal Abu-Ghazaleh (Jordan)
Hugo da Rocha Braga (Brazil)
Radomír Kosina (Czechoslovakia)

Rapporteur: John H. N. Kosieyo (Kenya)

D. Agenda

56. At its 1st meeting, on 13 March, the Group adopted the following provisional agenda, as contained in document E/C.10/AC.3/1990/1.

1. Election of officers.
2. Adoption of the agenda and other organizational matters.
3. Programme of work of the Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting.
4. Provisional agenda for the ninth session of the Group.
5. Adoption of the report of the Group on its eighth session.

57. The documents before the Group at its eighth session are listed in annex II to the present report.

Notes

1/ United Nations publication, Sales No. E.88.II.A.18.

2/ With the approval of the Group, the following organizations attended the session: International Accounting Standards Committee, International Federation of Accountants, Chartered Association of Certified Accountants of the United Kingdom and Fédération internationale des experts-comptables francophones.

Annex I

ISSUES FOR CONSIDERATION: EXTRACT FROM THE REPORT OF THE
SECRETARY-GENERAL ON INFORMATION DISCLOSURE RELATING TO
ENVIRONMENTAL MEASURES*

A. Report of the Board of Directors/management
discussion and analysis

1. The report of the Board of Directors/management discussion and analysis should set out the following:

(a) The type of environmental issues that are pertinent to the enterprise and its industry;

(b) The formal policy and programmes that have been adopted by the enterprise with respect to environmental protection measures (if no formal policy and programmes exist, it should be stated; if environmental audits are regularly carried out as a part of this policy, this should also be stated, as well as the main results, if material);

(c) The improvements in key areas that have been made since the introduction of the policy, or over the past 5-10 years, whichever is shorter;

(d) The environmental emissions targets that the enterprise has set for itself, and how the enterprise is performing relative to those targets;

(e) The extent to which environmental protection measures have been undertaken due to government legislation and, if so, the extent to which government requirements (for example, a timetable for the reduction of emissions) are being achieved;

(f) The financial or operational effect of environmental protection measures on the capital expenditures, earnings and competitive position of the enterprise for the current period and any specific impact on future periods.

B. Notes to the financial statements

2. The accounting policy notes should describe the policies adopted in accounting for environmental protection measures in, for example:

(a) Charging such amounts to operations;

(b) Capitalizing such amounts, and the amortization policy;

* E/C.10/AC.3/1990/5, sect. VII.

- (c) Recording liabilities;
- (d) Setting up provisions and catastrophe reserves;
- (e) Disclosing contingent liabilities;
- (f) Insuring against the consequences of harmful effects;
- (g) The treatment of grants (government and other);
- (h) Not charging or capitalizing such amounts due to tax rules.

3. When material, the following amounts should be disclosed, together with a description of the environmental measures to which they relate:

(a) The amount charged to operations in the current period (where it is not possible to segregate the amount that relates to environmental protection measures, this fact should be stated);

(b) The amount capitalized during the current period, the accumulated amount capitalized to date and the period for amortizing, or writing off, such amounts (where it is not possible to segregate the amount that relates to environmental measures, this fact should be stated);

(c) Liabilities, provisions and reserves that have been set for the current period, and amounts accumulated to date;

(d) Contingent liabilities, with an estimate of the amount involved, unless the likelihood of the confirming event is remote or the amount of the possible loss cannot be reasonably calculated (in which case the description of the contingent liability should continue to be furnished and the reason should be given why an estimate of the amount of the loss cannot be made). Management's classification of contingencies as being probable or possible should be specifically disclosed.

4. The tax effect and the timing of the realization of the tax effect of the recording of environmental measures should be disclosed.

5. The amounts of any government or other grants, tax treatment of environmental expenditures etc. received in the period for environmental protection measures, together with a description of the item to which they relate, should be disclosed.

Annex II

DOCUMENTS BEFORE THE GROUP AT ITS EIGHTH SESSION

<u>Document symbol</u>	<u>Agenda item</u>	<u>Title or description</u>
E/C.10/AC.3/1990/1	2	Provisional agenda
E/C.10/AC.3/1990/2	3	Review of important current developments at the global level in the field of accounting and reporting by transnational corporations: report of the Secretary-General
E/C.10/AC.3/1990/3	3	Review of important current developments at the national level in the field of accounting and reporting by transnational corporations: report of the Secretary-General
E/C.10/AC.3/1990/4	3	International survey of financial statements published by transnational corporations and other enterprises: report of the Secretary-General
E/C.10/AC.3/1990/5	3	Information disclosure relating to environmental measures: report of the Secretary-General
E/C.10/AC.3/1990/6	3	Appropriate measures to give effect to the work of the Group: report of the Secretary-General
E/C.10/AC.3/1990/7	3	Accounting for pension commitments: report of the Secretary-General
E/C.10/AC.3/1990/8	3	Accounting for and by joint ventures: report of the Secretary-General
E/C.10/AC.3/1990/9	3	Accounting for intangible assets: report of the Secretary-General
E/C.10/AC.3/1990/10	3	Further steps to be taken in relation to the development of the comprehensive information system: report of the Secretary-General

E/C.10/1990/7

English

Page 22

<u>Document symbol</u>	<u>Agenda item</u>	<u>Title or description</u>
E/C.10/AC.3/1990/11	3	Ways and means of improving education, research and practical training in the field of accounting and reporting in member States: results of the survey on Africa: report of the Secretary-General
E/C.10/AC.3/1990/L.1	2	Status of documentation for the session: note by the Secretariat
E/C.10/AC.3/1990/L.2 and Add.1-4	5	Draft report
E/C.10/AC.3/1990/L.3	3	Recommendations for better accounting and reporting for environmental measures
